No. 22,216

United States Court of Appeals
FOR THE NINTH CIRCUIT

AMERICAN SMELTING & REFINING COMPANY,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

ON PETITION TO REVIEW AND SET ASIDE, AND ON CROSS-PETITION TO ENFORCE AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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AUTHORITIES CITED

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JURISDICTION

This case is before the Court upon the petition of American Smelting & Refining Company (hereinafter called "the Company") to review and set aside an order of the National Labor Relations Board (R. 43-50).[1] In its answer to the

[1] "R" references are to pages of Volume I of the record as reproduced according to Rule 10 of the Rules of this Court. "Tr." references are to the transcript of testimony. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

petition, the Board has requested that its order be enforced in full (R. 52-53). The Board's Decision and Order issued on August 24, 1967, pursuant to Section 10(c) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Sec. 151 *et seq.*) and are reported at 167 NLRB No. 26. This Court has jurisdiction of the proceeding under Section 10(e) and (f) of the Act, the unfair labor practice having occurred at Silver Bell, Arizona, within this judicial circuit. No jurisdictional issue is presented.

COUNTERSTATEMENT OF THE CASE

I. THE BOARD'S FINDINGS OF FACT

The Board found that the Company violated Section 8(a)(5) and (1) of the Act by increasing rental charges for Company housing at its Silver Bell mine without prior negotiation with the Union (R. 24-25).[2] The underlying facts may be summarized as follows:

A. Background

Silver Bell, Arizona, is located approximately 40 miles from Tucson (R. 12; Tr. 6, 38). In December 1951, the Company contracted out a copper stripping and mining operation to Isbell Construction Company, whose employees performed

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[2] Local Union 13886, International Union of District 50, United Mine Workers of America.

the stripping and mining until April 1, 1957, at which time the Company's employees took over those functions (R. 12; Tr. 8). The Company's crusher and concentrator[3] were completed in 1954 and the first production from the mine was shipped in that year (R. 12; Tr. 9).

Upon completion of the crusher and concentrator in 1954, the Company recognized the Union as the bargaining representative of its production and maintenance employees at Silver Bell (R. 12; Tr. 11).[4] The first labor agreement between the Company and the Union was concluded on December 15, 1954. Later agreements were negotiated in 1956, 1959, 1961, 1962 and 1964. The 1964 agreement terminated on September 30, 1967 (R. 14; Tr. 11).

B. Company Housing at the Silver Bell Mine

The Company commenced construction of a townsite at Silver Bell late in 1951. The first houses were occupied in the fall of 1952. The town, as it presently exists, consists of 175 detached single family dwellings, of which 68 are three-bedroom houses and 107 are two-bedroom houses. In addition,

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[3] A crusher is employed to reduce the mined mineral to a sand-like consistency. The concentrator, thereafter, separates the ore from impurities in the crushed copper.

[4] Since the mining employees at that time were employed by Isbell Construction Company, they were not included in the unit (R. 12; Tr. 11). Beginning with the 1956-1959 agreement, however, and in all subsequent agreements, the mining employees became part of the bargaining unit (R. 13; Tr. 12).

there are 24 two and three bedroom apartments, and 50 trailer spaces.[5] (R. 12; Tr. 8-9). The town also includes a grocery store, a church, a barber shop, a post office and a service station (R. 12; Tr. 77, 89).

From 1952 until April 1, 1957, the dwellings were occupied by employees of the Company and of Isbell Construction Company. Since April 1, 1957, with the exception of a few individuals (the minister, the barber and employees of one of the Company's sub-contractors), all occupants have been Company employees (R. 13; Tr. 9, 12, 24-25).

As of October 12, 1966, the Company employed 317 persons at Silver Bell, 264 of whom were in the bargaining unit. Of these 264, 175 (approximately 65%) lived in Company housing at Silver Bell[6] (R. 13; Tr. 12). Since Company housing at Silver Bell was adjacent to the mine, it took employees who lived there "about two minutes" to get to work (Tr. 38). Most of the remaining 89 bargaining unit employees lived 40 miles away in Tucson, and a few lived in the intermediate communities of Marana and Cortaro, both of which are approximately 25 miles from the Silver Bell mine (R. 12-13, 23-24; Tr. 63).

Although no one is required by the Company to live in its houses, they are all occupied and there is a waiting list (R. 13; Tr. 19, 64-5). Since the houses were opened in 1952, rentals

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[5] The Company did not raise the rent it charged for apartments and trailer spaces (R. 13; Tr. 14).

[6] Thirty-three salaried employees who are not in the bargaining unit also lived in Company houses. (R. 13; Tr. 13).

have been $45.00 for a two-bedroom house and $50.00 for a three-bedroom house, including utilities (R. 13; Tr. 18). Tenants entered into written leases with the Company covering terms of their tenancy, and employees paid their rent by payroll deductions which they had authorized in writing (R. 13; Tr. 16, 48). Operation and maintenance of the residences and the townsite were performed by the Company's maintenance employees (R. 13; Tr. 16). At no time between 1952 and 1966 did the Company raise the rental charges (R. 15; Tr. 16).

C. The Company Unilaterally Raises the Rents on Its Silver Bell Houses

On July 22, 1966, the Company sent a letter to each of its tenants announcing the first rent increase since the houses were opened 14 years before (Co. Br. p. 5). The letter stated that, effective August 1, 1966, the rent on two bedroom houses would be increased by $5.00 and that the charge for three bedroom houses would be $10.00 per month higher (R. 13; Tr. 14). The Union was not consulted prior to this decision to raise rents, the first such increase since it had become the bargaining representative (R. 13; Tr. 13-14, Co. Br. p. 5).

Shortly after the raise was announced, a grievance meeting was held at which Union representatives stated that any increase in rent must be negotiated with the Union. However, Company officials replied that rentals were not a bargaining matter and were "none of the Union's business" (R. 13; Tr. 46). The Union, thereupon, requested a negotiating meeting between the Company and the International and Local Unions. However, at the subsequent meeting called by the Company on August 17, 1966, the Company again refused to bargain

concerning the rent increases (R. 13; Tr. 46-47). The new rentals went into effect on September 1, 1966 (R. 13; Tr. 15, 47).

II. THE BOARD'S CONCLUSION AND ORDER

The Board concluded that the Company violated Section 8(a)(5) and (1) of the Act by failing and refusing to bargain with the Union concerning rent increases on Company housing at Silver Bell. Accordingly, the Board ordered the Company to cease and desist from unilaterally increasing rental charges without prior notification to, and bargaining with, the Union. Affirmatively, the Board ordered the Company to reinstate the rental charges in effect prior to the unilateral increases; to make whole, with interest at 6% per annum, all employees in the unit who had paid the increased rental charges; and to post appropriate notices (R. 39 fn. 1, 40, 24-25).

ARGUMENT

THE BOARD PROPERLY CONCLUDED THAT THE COMPANY VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY UNILATERALLY INCREASING THE RENTAL CHARGES FOR COMPANY HOUSING AT ITS SILVER BELL MINE

A. Introduction

The Company concedes that it unilaterally raised the rent charged employees for Company-owned housing at the Silver Bell mine site. Its sole defense to the finding that its action constituted an unlawful refusal to bargain is that the rent

charged employees was not a mandatory subject of bargaining. We show below that the Board's contrary conclusion is supported by both precedent and policy and that its bargaining order should be enforced.

Section 8(a)(5) of the National Labor Relations Act declares it to be an unfair labor practice for an employer

> to refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9(a).[7]

Section 9(a), the relevant portion of which was part of the original Wagner Act, provides that the representative designated by the majority shall be the exclusive representative

> for the purpose of collective bargaining in respect to rates of pay, wages, hours of employment or other conditions of employment.

Section 8(d), added in 1947 by the Taft-Hartley amendments, provides, *inter alia*, as follows:

> [T]o bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours and other terms and conditions of employment . . . .

Thus, the above conditions impose on both the employer and the union the duty to bargain with each other in good faith with respect to "wages, hours and other terms and con-

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[7] Section 8(b)(3), in similar terms, proscribes a union's refusal to bargain with the employer.

ditions of employment." *N.L.R.B. v. American National Insurance Co.*, 343 U.S. 395.

By its contention that this phrase does not encompass the rentals charged employees at Silver Bell, the Company necessarily asserts that the employees' objections to the increased charge for Company housing at the mine site is a dispute which need not be resolved within "the framework established by Congress as most conducive to industrial peace." *Fibreboard Paper Products Corp. v. N.L.R.B.*, 379 U.S. 203, 211. Yet, "[o]ne of the primary purposes of the Act is to promote the peaceful settlement of industrial disputes by subjecting labor-management controversies to the mediatory influence of negotiation." *Ibid.* The only question, therefore, is whether the dispute shall be resolved within the framework of collective bargaining established by national policy or left outside that framework, to fester without negotiation and perhaps break out in economic warfare.[8]

Cognizant of the industrial strife brought on by refusals to confer and negotiate, Congress intended the phrase "terms and conditions of employment" to be applied broadly. Indeed, in 1947, Congress considered and rejected proposals of narrower phraseology, which were offered in an effort to curtail the scope of mandatory labor-management negotiations.[9]

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[8] See P. Ross, *The Government as a Source of Union Power: The Role of Public Policy in Collective Bargaining*, pp. 155-159, 262-265 (Brown University Press, 1965).

[9] H.R. 3020, 80th Cong., 1st Sess., Sec. 2(11), 1 Leg. Hist. of the Labor Management Relations Act, 1947 (G.P.O., 1948), 163-167; House Report No. 245, 80th Cong., 1st Sess., 22-23, 1 Leg. Hist. 313-314. The change was opposed on the ground, *inter alia*, that what is a proper subject for collective bargaining "should not be strait-jacketed by legislative

(continued on p. 9)

Furthermore, it is well-settled that bargaining is required with respect to numerous other subjects of employee concern beyond working hours and wages.[10] We show below that where, as here, Company housing is adjacent to the place of work, alternative housing is 25 to 40 miles away, and rental charges for the Company housing have not changed for 14 years, such housing, like the subjects listed above, constitutes an important employee benefit and a "condition of employment" concerning which there may be no alteration prior to negotiation with the employees' collective bargaining representative.

B. In the circumstances of this case, rentals charged employees are a mandatory subject of bargaining

As detailed in the Counterstatement, the Company began construction of the housing at Silver Bell in late 1951 – the same time that it started stripping the overburden from the mine. Since then, the Company has continually owned and

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(9 Continued)

enactment." House Minority Report No. 245, 80th Cong., 1st Sess., 71, 1 Leg. Hist. 362. The Senate resisted the proposed change, and the Wagner Act definition of bargaining was left unchanged. See 93 Cong. Rec. 6443, 2 Leg. Hist. 1539.

[10] Thus, the statutory phrase "conditions of employment" has been held to encompass retirement and pension plans (*Inland Steel Corp. v. N.L.R.B.*, 170 F.2d 247 (C.A. 7), certiorari denied on this issue, 336 U.S. 960); health plans (*McLean v. N.L.R.B.*, 333 F.2d 84 (C.A. 6)); safety rules (*N.L.R.B. v. Gulf Power Co.*, 384 F.2d 822 (C.A. 5)); union security clauses (*N.L.R.B. v. Wooster Div., Borg-Warner Corp.*, 356 U.S. 342); and the subcontracting of bargaining unit work (*Fibreboard Paper Products Corp. v. N.L.R.B., supra).*

maintained the houses, using its own maintenance employees to perform the latter task. Sixty-five percent of the bargaining unit employees live in these houses. The handful of non-employee occupants of Silver Bell homes are either employees of a subcontractor working at the mine for the Company or individuals such as a grocer, a barber and a minister, all of whom serve the employee community. In short, the townsite at Silver Bell is a "company town," constructed and maintained for the purpose of providing accessible housing for people who work at the mine.[11]

The record shows that the Company has always viewed the Silver Bell homes as an employee benefit. Thus, it is established Company policy that when an individual leaves the

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[11] The Company states that "homes are rented, and in the past have been extensively rented, to, 'outsiders', which further shows that this was not a term and condition of employment." (Co. Br. p. 27). However, the stipulated evidence is that the "outsiders," aside from the grocer, the minister and the barber, who have lived at Silver Bell in the past were employees of Isbell Construction Company who were then engaged in performing mining operations pursuant to a subcontracting arrangement with the Company. No Isbell employees have resided at Silver Bell since April 1, 1957 when the Company's own employees completely took over this operation themselves (Tr. 8-9). This is the sum total of the evidence of past residence of "outsiders". As to the present, only a small percentage of residents of Silver Bell are non-employees of the Company. These include the three individuals mentioned above and "certain employees" of a company performing drilling operations at Silver Bell pursuant to a subcontract with the Company (Tr. 24-26). We submit that this evidence hardly detracts from the finding that Silver Bell is essentially maintained in order to provide a nearby place to live for employees working at the mine.

Company's employ, he must vacate his Silver Bell home shortly thereafter.[12] Furthermore, in a prior contract negotiation, the Company met Union demands to equalize a pay differential between Silver Bell and another area mine by explaining that employees at the other mine received travel allowance whereas Silver Bell employees had housing available at the mine site (R. 40; Tr. 45, 90-93).

More importantly, regardless of how the Company viewed the Silver Bell housing facilities, it is clear that these houses constituted a substantial employee benefit. The convenience of living adjacent to one's place of work – especially when the alternative is living from 25 to 40 miles away – cannot be discounted. Moreover, the fact that rentals had not changed for 14 years clearly indicates that, prior to the unilateral increase, Silver Bell homes were renting below the prevailing rate. See, *N.L.R.B. v. Lehigh Portland Cement Co.*, 205 F.2d 821, 823 (C.A. 4). It is little wonder that there are no empty houses and that there is a waiting list of employees anxious to fill

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[12] We are unable to understand the significance which the Company attaches to the fact that it allowed one employee to remain at Silver Bell for six to eight weeks subsequent to the time he left the Company's employ (Co. Br. pp. 27-28). Surely, whether or not these homes constitute a term and condition of employment does not turn on whether an employee whose employment terminates is given a reasonable period of time to find other housing rather than being forced to vacate immediately. The crucial consideration in this respect is that all parties understand that, with the exception of the few people who service the community, employment at Silver Bell is a *sine qua non* of residence there.

In any event, we concede that, in the Company's words, this was "[t]he best example" of the Company's alleged practice of allowing "outsiders" to live at Silver Bell (Co. Br., p. 27).

any vacancies which occur. As the Board found, these circumstances have "given the occupants of the company's housing substantial advantages which undoubtedly affect their conditions of employment" (R. 39, n. 1).

The case most closely approximating the situation here involved clearly supports the Board's conclusion. In *N.L.R.B. v. Lehigh Portland Cement Co.*, 205 F.2d 84 (C.A. 4), only 25 percent of the employees lived in homes owned by the employer as compared with 65 percent in the case at bar. The employer raised the rent without consultation with the union and defended the ensuing refusal to bargain charge on the ground that the employees were not required to live in company houses. The Court expressly refused to hold, as the company urges this Court to hold, that the rental charged by the employer could not be a mandatory subject for bargaining unless living in company houses was a necessary aspect of working for the employer.[13] "It is sufficient to bring them within the field of collective bargaining if their ownership and management materially affects the conditions of employment." 205 F.2d at 823. On grounds identical to those relied upon by the Board here, the Court concluded that, in the circumstances presented, conditions of employment were materially affected.

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[13] The Court denied the contention that its earlier decision in *N.L.R.B. v. Hart Cotton Mills, Inc.*, 190 F.2d 964, stood for this proposition, stating, "we did not lay down the general proposition that company houses were never the proper subject of collective bargaining unless they are a necessary part of the enterprise or their occupancy affects the workers' pay." 205 F.2d at 823.

Nevertheless, petitioner here quotes the same portions of the *Hart* opinion urged upon the Court in *Lehigh* and gives the *Hart* decision an interpretation which has been expressly rejected by the court which issued it. See Co. Br. p. 29.

> "That no increase in rent was made between 1937 and 1951 indicates that the rents have been below the prevailing rate; and this circumstance coupled with the convenience of living nearer to the place of work than the great majority of the employees has given the occupants of the company's houses substantial advantages which undoubtedly affected their conditions of employment . . . . Under the circumstances of this case the matter is of sufficient importance as to require its submission to the process of collective bargaining." 205 F.2d at 823-824.[14]

N.L.R.B. v. Bemis Bro. Bag Co., 206 F.2d 33 (C.A. 5), heavily relied upon by the Company (Br. pp. 22-27), is distinguishable. In *Bemis*, the Court noted that the company's plant was "immediately adjacent" to Talledega, Alabama, a city of some 13,800 inhabitants, and that the company's houses "are located in the immediate area adjoining the city limits of Talledega, and are approximately two miles from the center of town." 206 F.2d at 35. The Court further noted that although all the company's houses were filled, "there are vacant dwellings available for rental in the community" and indeed, sufficient accommodations in the community for all of the company's employees. 206 F.2d at 36. Thus, in *Bemis*,

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[14] The Company seeks to minimize the applicability of *Lehigh Portland* by emphasizing the fact that the Court limited its holding to "the circumstances of this case." See Co. Br., p. 28, italicizing this language from the Court's opinion. However, as the portion of the Court's opinion quoted in the text illustrates, the circumstances deemed crucial by the *Lehigh-Portland* court – no increase in rentals for 14 years coupled with the convenience of living close to the place of work – are precisely the circumstances relied on by the Board in the case at bar.

the alternative to living in company houses was not a twenty-five or forty mile trip to work. In *Bemis*, unlike this case or *Lehigh Portland, supra*, the convenience of living close to one's place of work was not peculiar to the employer's housing facilities.[15]

Bemis is further distinguishable from *Lehigh Portland* and the case at bar in that there the employer was not raising the rental for the first time in many years. Rather the employer sought only to return to the rate he had charged a few years earlier. 206 F.2d at 34. Thus, one could not conclude, as did the Court in *Lehigh*, that a long unchanged rental was below the prevailing rate. In short, in *Bemis* the Court had reason for holding that no substantial employee benefit was involved and that the record did not reveal "any reason save individual choice why one-third of the employees occupy company housing." 206 F.2d at 38. This is not the situation here presented.[16]

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[15] The Company recognizes that *Bemis* is thus distinguishable (Co. Br., pp. 26-27). Furthermore, the portions of the Court's opinion quoted in the text belie the Company's contention that the Court did not give emphasis to these factors.

[16] *Kohler Co.*, 128 NLRB 1062, enforced in part and remanded in part, 300 F.2d 699 (C.A. D.C.), cert. denied, 370 U.S. 911, does not aid petitioner. There, the Court enforced the Board's ruling that the employer violated Section 8(a)(1) of the Act by evicting employees from company-owned housing in reprisal for strike activities. 300 F.2d at 701, n. 1. The Court did not discuss the portions of the Board's decision quoted at length at Co. Br., pp. 31-32. The Board was there assessing the further contention that the evictions also constituted a violation of Section 8(a)(3), an issue which, it pointed out, had no significant impact on the case before it since the desired remedy — repossession of company houses — had been already granted in view of the finding that Section

(Continued on p. 15)

Finally, the Company makes much of the fact that its witnesses testified that when contracts were negotiated the Union never sought to raise the matter of rental charges. See Co. Br., pp. 9-16. The Trial Examiner credited the Company's witnesses on this point, at least as to the negotiations immediately prior to the latest collective bargaining agreement (R. 14).[17] However, there is no merit to the contention that

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[16] (Continued)
8(a) (1) had been violated. 128 NLRB at 1093, n. 53.

In any event, the Board and the Trial Examiner were in substantial agreement that on the evidence presented, company housing was not shown to be a term and condition of employment (and hence there was no discrimination within the meaning of Section 8(a) (3)) because residence was not restricted to employees, rents had not been shown to be below prevailing rates and there was no showing that other nearby facilities were not available. 128 NLRB at 1092, 1186-1187. The Trial Examiner had taken the view that these factors were overcome as to one employee, Faas, because his lease formerly contained a clause linking his rental charge to his employment status. 128 NLRB at 1187-1189. However, the Board was unable to agree with the conclusion that this outweighed the other factors involved because the crucial clause had been omitted from Faas' present lease and because there had been no showing that his rental was lower than that payed by other tenants, employee or nonemployee. 128 NLRB at 1092-1093. As demonstrated in the text, here, unlike *Kohler*, the record does contain other evidence establishing that the Company's housing facilities at Silver Bell constituted a term and condition of employment.

[17] Contrary to the Company's witnesses, the Union negotiator testified that during all prior negotiations the Union had asked for and received assurances that rents would not be raised (Tr. 41-43). The Trial Examiner discredited his testimony concerning the last negotiations because no mention of such assurances was included in a prehearing affidavit which the Union witness had given a Board investigator. That affidavit did contain some mention of an assurance of this type during the 1956 negotiations (Respondent's Exhibit 1), but the Trial Examiner made no express credibility finding concerning negotiations other than the latest talks. As we show in the text, the matter was legally irrelevant.

because the contract and the parties were silent on the subject, the employer cannot be required to bargain prior to increasing the rental charge. Silence with respect to a mandatory bargaining subject at the time the contract is entered into does not relieve the parties of all subsequent obligation to bargain about such a subject. *N.L.R.B. v. Jacobs Mfg. Co.,* 196 F.2d 680, 684 (C.A. 2). Certainly, where no contract provision covers a mandatory bargaining subject of bargaining, the employer may not make unilateral changes respecting that subject and refuse to discuss the matter with the union. *N.L.R.B. v. C & C Plywood Corp.,* 385 U.S. 421, 430; *General Tire Co. of Fla. v. N.L.R.B.,* 337 F.2d 452, 454 (C.A. 5); *N.L.R.B. v. Niles-Bement-Pond Co.,* 199 F.2d 713 (C.A. 2).

As these cases further show, the fact that the union did not raise a particular subject during bargaining and that the contract contains no provision concerning it, does not constitute a waiver by the union of its right to be consulted with respect to changes in that subject which the employer seeks to institute. Such a waiver by the union must be "clear and unmistakable" and will be inferred only if an evaluation of prior negotiations indicates that the matter was fully discussed and that the union consciously yielded its interest in the matter. *C & C Plywood,* 148 NLRB 414, 416, approved, *N.L.R.B. v. C & C Plywood, supra,* 385 U.S. at 430-431.[18] Nothing in this

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[18] Compare the views of Professors Cox and Dunlop who take the position that in the absence of evidence to the contrary, the parties are to be presumed to have agreed that major terms and conditions of employment not covered by the contract would remain as they were *unless changed by mutual agreement.* Cox & Dunlop, The Duty To Bargain Collectively During The Term of an Existing Agreement, 63 Harv. L. Rev. 1097, 1116 et seq., especially 1118 (1950).

record would support a finding that the Union waived its right to bargain about rental increases involving employee housing. In these circumstances, the Company must adhere to existing working conditions or bargain with the Union with respect to any changes.

CONCLUSION

For the foregoing reasons, the Company's petition to review the Board's order should be denied, and the Board's order should be enforced in full.

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March 1968

CERTIFICATE

The undersigned certifies that he has examined the provisions of Rules 18 and 19 of this Court, and in his opinion the tendered brief conforms to all requirements.

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Assistant General Counsel,
National Labor Relations Board

APPENDIX

Index to Reporter's Transcript

(Numbers are to pages of Reporter's transcript)

Board Case No. 28-CA-1435

GENERAL COUNSEL'S EXHIBITS

No.	Identified	Offered	Received in Evidence
1(a)-1(f)	5	5	5
2	6	6	7
3	9	9	10
4	11	11	12
5	14	14	15
6	16	16	17
7	19	20	28
8	31	31	Rejected
9	33	33	Rejected
10	62		

RESPONDENT'S EXHIBITS

No.	Identified	Offered	Received in Evidence
1	52	56	57
2	68	68	96

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